LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U.S.
FILED
NOV 12 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1957

No. 607

MILDRED L. MILLER, individually and as Administratrix of the goods, chattels and credits of JAMES W. MILLER, deceased,

Petitioner,

v.

FARRELL LINES, INCORPORATED,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

HERBERT J. KAPLOW,
39 Broadway,
New York 6, N. Y.,
Attorney for Petitioner.

INDEX

	PAGE
Petition for Writ of Certiorari	1
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes Invoked	2
Statement of the Case	3
Reasons for Granting the Writ	7
Conclusion	14
APPENDIX A: Opinion Below:	
1. Opinion of Court of Appeals	15
2. Jury Verdict	23
APPENDIX B: Statutes and Rules:	
45 U. S. C. 52	25
46 U. S. C. 668	24
Rule 49 Federal Rules of Civil Procedure	27
Rule 50 Federal Rules of Civil Procedure	26
United States Constitution—Amendment VII	27

Table of Cases Cited

Arnold v. Panhandle & S. F. R. Co., 353 U. S. 360	8
Bailey v. Central Vermont R. Co., 319 U. S. 350	11, 12
Casey v. American Export Lines, 173 F. 2d 324 (2 Cir. 1949)	10
Deen v. Gulf, C. & S. F. R. Co., 353 U. S. 925	8
Ferguson v. Moore-McCormack Lines, Inc., 352 U. S. 521	8
Futrelle v. Atlantic Coast Line R. Co., 353 U. S. 920	8
Galloway v. U. S., 319 U. S. 372 (1943)	12

PAGE

Gibson v. Elgin, Joliet & Eastern Railway Co., 246 F. 2d 834 (7 Cir. 8/30/57) 13

Gibson v. Thompson (unofficial), 26 U. S. Law Week 3128 (10/21/57) 7

Kermarec v. Compagnie Generale Transatlantique, 245 F. 2d 175 (2 Cir. 1957) 13

Lavender v. Kurn, 327 U. S. 645 .....2, 9, 10, 13

McBride v. Toledo Terminal R. Co., 354 U. S. 517 .. 8

Palermo v. Luckenbach Steamship Company, 246 F. 2d 557 (2 Cir. 1957) and (unofficial) 26 U. S. Law Week 3128 (10/21/57) 13

Ringhiser v. Chesapeake & O. R. Co., 354 U. S. 901 8

Rogers v. Missouri Pacific R. Co., 352 U. S. 500 .. 2, 7, 8, 9, 13

Schulz v. Pennsylvania Railroad Co., 350 U. S. 523 .. 12

Shaw v. Atlantic Coast Line R. Co., 353 U. S. 920 .. 8

Tennant v. Peoria & P. U. R. Co., 321 U. S. 29 10

Thomson v. Texas & Pacific R. Co., 353 U. S. 926 8

Tiller v. Atlantic Coast Line R. Co., 318 U. S. 68 11

Washington & Georgetown R. Co. v. McDade, 135 U. S. 554 11

Webb v. Illinois Central R. Co., 352 U. S. 512 8

Wilkerson v. McCarthy, 336 U. S. 53 14

Statutes Cited

45 U. S. C. 52 ..... 7, 8
46 U. S. C. 688 .....2, 3, 7, 8, 9

Rule 49 Federal Rules of Civil Procedure 8
Rule 50 Federal Rules of Civil Procedure 9

United States Constitution—Amendment VII 12

IN THE

Supreme Court of the United States

October Term, 1957

No.

MILDRED L. MILLER, individually and as Administratrix of the goods, chattels and credits of JAMES W. MILLER, deceased,

Petitioner,

v.

FARRELL LINES, INCORPORATED,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Mildred L. Miller, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit which affirmed the judgment of the United States District Court for the Southern District of New York directing a verdict for the respondent after a jury verdict was returned in favor of petitioner.

Opinions Below

The opinion of the Court of Appeals has been officially reported. 247 F. 2d 503. The District Court did not render an opinion. The opinion of the Court of Appeals is set forth in Appendix A, infra, pp. 15-23.

Jurisdiction

The decision and judgment of the Court of Appeals for the Second Circuit was decided and entered on August 16, 1957.

The jurisdiction of this Court to review this decision and judgment is predicated upon Title 28 United States Code, Sections 1254(1) and 2101(c).

Questions Presented

1. Whether the Court of Appeals, in affirming the judgment of the Trial Court which set aside the jury verdict in favor of petitioner in this *Jones Act* case and granted judgment to respondent, erroneously deviated from the principles of law established by this Court in the case of *Rogers* v. *Missouri Pacific Railroad Co.*, 352 U. S. 500.

2. Whether the Court of Appeals, in affirming the judgment of the Trial Court in this *Jones Act* case, erroneously deviated from the principles of law, concerning the scope of the jury's function, established by this Court in the case of *Lavender* v. *Kurn*, 327 U. S. 645.

3. Whether petitioner was deprived of her constitutional right of trial by jury when the Court of Appeals indulged in a re-evaluation of the facts to reach conclusions different from those of the jury.

Statutes Invoked

The pertinent statutes are set forth in App. B, infra, pp. 24-27.

Statement of the Case

This suit at law predicated upon the provisions of the Jones Act, 46 U. S. C. Section 688, was an action to recover pecuniary damages for the wrongful death of petitioner's decedent who was lost at sea through the negligence of respondent.

The complaint alleged two alternative counts of negligence. The first count alleged negligent failure to provide adequate, prompt and proper medical care and attention. The second count alleged negligent failure to take proper and efficient means to effect a rescue of petitioner's decedent. The case was tried on these alternative theories.

Trial was held before the Honorable Edmund L. Palmieri and a jury in the United States District Court for the Southern District of New York on October 18, 19, 20, 21, 24 and 25, 1955.

The Court submitted the case to the jury with directions to bring in answers to special interrogatories together with a general verdict.

After deliberating approximately eight hours, the jury returned with a general verdict in favor of petitioner in the sum of $55,000 and simultaneously, the jury returned with answers to all the special interrogatories which were consistent with their general verdict (App. A, infra, pp. 23-24).

The Court then, within minutes after the jury verdict, upon motion of defendant-respondent, set aside this jury verdict and directed a verdict for defendant-respondent.

James W. Miller (petitioner's decedent) signed shipping articles on the S.S. "African Glade" on November 10, 1950 as assistant electrician (R. 88).* He disappeared

---

* R. refers to pages of Transcript of Record.

at sea during a voyage on the night of November 14-15, 1950 (R. 102). He was given up as lost at sea on November 15, 1950 (R. 102).

The S.S. "African Glade" set sail, with a full crew and eleven passengers, from New York in the evening of November 10, 1950 on her course for Dakar, West Africa, her first port of call (R. 77). The voyage was on a trade route of the Atlantic Ocean regularly used as a shipping lane or highway for United States to West Africa commerce (R. 354).

With respect to the first count of negligence (commonly called "neglect to treat") Chief Electrician Levy, decedent's superior (R. 153) and roommate (R. 154), testified that Miller had not slept in his bed for two consecutive nights (the nights of November 13-14 and November 14-15 (R. 199); that Miller was quiet (R. 230); that Miller shared a bottle of rum with another seaman on the night of November 12 (R. 193); that Miller asked Levy for a cigarette although Miller had originally told Levy that he had given up smoking (R. 231).

The jury, by their negative answer to Interrogatory First, decided this issue of fact of "neglect to treat" against the plaintiff on the first count of negligence. A reasonable inference from this jury answer is that decedent was not mentally disturbed when he fell into the sea.

With respect to the second count of negligence (commonly called "failure to rescue"), the petitioner called as witnesses (in addition to Chief Electrician Levy), Captain Wilder (Master of the S.S. "African Glade") (R. 76) and Captain Feinne, a Master-Mariner and maritime expert (R. 323). Captain Wilder's testimony was presented by his deposition (Court Ex. 1—R. 163) originally taken by the defendant.

Captain Wilder testified that he was informed at 10:20 A. M. on November 15 of the fact that Miller was appar-

ently not on board the ship (R. 79); that he caused searching parties to be sent to various parts of the ship (R. 79); that simultaneously he turned the ship about on a reverse course as he believed Miller had fallen over the side (R. 79); that he interrogated only Chief Electrician Levy (R. 113), Chief Steward Aiken (R. 114) and First Assistant Engineer Crowell (R. 115); that he learned from Aiken that Aiken last saw Miller alive at 11:30 P. M. on November 14; that he assumed from Levy's information that Miller disappeared prior to 6 A. M. on November 15 (R. 102); that he did not interview the entire crew (R. 115) nor any of the passengers concerning Miller's disappearance; that he radioed only once to a U. S. Coast Guard Weather Ship (R. 79) and had no further communication with the U. S. Coast Guard; that he did not communicate with any other ships in the ocean track though it was a known trade route; that he did not require the navigating officer, Second Mate Ware, to obtain any "fix" of "position" at any time during the day of November 15; that he called off the search at 5:16 P. M. on November 15 when darkness set in; that he did not use the searchlight of the ship though it was available; that the vessel traveled approximately 165 miles between 11:30 P. M. November 14 and 10:30 A. M. November 15 (R. 99); that the vessel traveled approximately 95 miles between 10:30 A. M. November 15 and 5:16 P. M. November 15 (R. 99); that the air temperature varied from 77° at noon of November 14 to 76° at noon of November 15 and at midnight of November 14-15 it was 74° (R. 111).

Captain Feinne, plaintiff's maritime expert, testified that, according to the known positions of the ship as given in the ship's log, the Master (Captain Wilder) *had not* reversed course on a *reciprocal* course but *had* reversed course on a *parallel* course and was twelve to thirteen miles south of a reciprocal course (Ptf. Ex. 34—R. 343) (R. 461); that the Master had not returned on his own track (R. 346) (R. 397); that a competent master would return to a posi-

tion where Miller was last known to be alive (R. 349); that upon reaching that position a competent master would perform a search pattern with the ship (R. 359); that a competent master would radio other ships on this trade route or ocean "highway" (R. 354); that a competent master would be in frequent communication with the U. S. Coast Guard; that a competent master would have the navigating officer check the ship's position during the search and try to establish by celestial navigation where the ship was (R. 344); that a competent master would interrogate all crew members (R. 359) and passengers to learn as much as possible about the disappearance; that a fall from the after-end of the vessel could or could not cause injury (R. 472); that a person falling from the after-end of the vessel would not be caught up in the propeller (R. 488).

Captain Feinne testified that in his expert opinion Captain Wilder did not make a competent and efficient search (R. 376, 779).

Respondent called two Master-Mariners as experts who testified that Captain Wilder had performed an efficient rescue search.

The Court with painstaking detail set forth the jury's duty to decide between the maritime experts on the issue of adequate search and to determine whether (assuming the jury found the search was inadequate) this inadequate search was the proximate cause, at least in part, of Miller's death (R. 872-875).

REASONS FOR GRANTING THE WRIT

I

The decision of the Court of Appeals in this Jones Act case is in direct conflict with the decisions of this Court in *Rogers* v. *Missouri Pacific R. R. Co.* and subsequent cases.

This Court clearly enunciated the extent of judicial function in relation to jury questions in F. E. L. A. (45 U. S. C. § 51 *et seq.*) and Jones Act (46 U. S. C. 688) cases in the following language in *Rogers* v. *Missouri Pacific Railroad Co.*, 352 U. S. 500:

> "Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, *even the slightest,* in producing the injury or death for which damages are sought. It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including the employee's contributory negligence. Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer *played any part* at all in the injury or death. Judges are to fix their sights primarily to make that appraisal and, if that test is met, are bound to find that a case for the jury is made out whether or not the evidence allows the jury a choice of other probabilities. The statute expressly imposes liability upon the employer to pay damages for injury or death due 'in whole or *in part* [to its] negligence.' (Emphasis added.)"

As recently as October 21, 1957 this Court made the following order Per Curiam in *Gibson* v. *Thompson* (reported unofficially in 26 U. S. Law Week 3128):

> "142 Gibson v. Thompson, Per Curiam:
>
> The petition for certiorari is granted, and the judgment of the Supreme Court of Texas is reversed

and the case is remanded. We hold that the proofs justified with reason the jury's conclusion that employer negligence played a part in producing the petitioner's injury. Rogers v. Missouri Pacific R. Co., 352 U. S. 500; Webb v. Illinois Central R. Co., 352 U. S. 512; Ferguson v. Moore-McCormack Lines, Inc., 352 U. S. 521; Shaw v. Atlantic Coast Line R. Co., 353 U. S. 920; Futrelle v. Atlantic Coast Line R. Co., 353 U. S. 920; Deen v. Gulf, C. & S. F. R. Co., 353 U. S. 925; Thomson v. Texas & Pacific R. Co., 353 U. S. 926; Arnold v. Panhandle & S. F. R. Co., 353 U. S. 360; Ringhiser v. Chesapeake & O. R. Co., 354 U. S. 901; McBride v. Toledo Terminal R. Co., 354 U. S. 517. For the reasons set forth in his opinion in Rogers v. Missouri Pacific R. Co., 352 U. S. 500, 524, Mr. Justice Frankfurter is of the view that the writ of certiorari is improvidently granted."

It is clear therefore that in these Federal Employers Liability Act and Jones Act cases which are significantly different from ordinary common-law negligence actions this Court has endeavored explicitly to set forth the jury functions and the functions of the Judge and the tests to be applied in order to effectuate the intent of Congress. In the instant case the opinion of the Court of Appeals for the Second Circuit is a good illustration of how "erosion" of the F. E. L. A. and Jones Act results from narrow construction.

The jury in this case found conclusively that the Master of the vessel performed an inefficient and negligent rescue and that this negligence played a part in the death of petitioner's decedent. We know this not only from the general verdict of the jury but also from the jury's answers to the Special Interrogatories [App. A] submitted to them by the Trial Court pursuant to Rule 49 Federal Rules of Civil Procedure.

Neither the Trial Court nor the Court of Appeals was satisfied to permit the jury's findings to stand. The Trial Court wrote no opinion but merely granted respondent's

motion for directed verdict, made pursuant to Rule 50, and set aside the verdict for petitioner and granted judgment n. o. v. to the respondent. The Court of Appeals finds that the Master of the vessel performed an efficient rescue. By so doing the Court of Appeals acts in conflict with the principles and concepts of the *Rogers* case. This misconception of the Court of Appeals is not cured by the mere fact that that Court pays lip service to the *Rogers* case by citing it.

This Court should continue to exercise its power to review in this case in which the Court of Appeals has improperly deprived this petitioner of her right to a jury determination and in which the Court of Appeals has attempted to whittle away the remedy enacted by Congress.

II

The Court of Appeals has failed to recognize that the jury in a Jones Act case is permitted to engage in a measure of speculation in accordance with the principles of law set forth by this Court in *Lavender* v. *Kurn*.

It was the function of the jurors to decide whether there was an efficient rescue attempt. From the evidence adduced, they were justified in finding *as they did* that Miller was alive at the start of the search and that a Master who was 12 to 13 miles south of the correct reverse course and who only communicated with the U. S. Coast Guard weather ship once during the entire search and who did not attempt to communicate by radio with any other ships in this well-traveled trade route and who did not ascertain accurately the course he had been on nor the reverse course he was following, certainly *contributed at least in part* to Miller's death.

It is no answer (to the problem of whether it is properly a jury function to determine this issue of fact), to say that the exercise of the jury function involves a measure of speculation and conjecture. In *Lavender* v. *Kurn*, 327 U. S. 645, the Supreme Court, in discussing this very question said at page 653:

> "It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable."

In *Casey* v. *American Export Lines*, 173 F. 2d 324 (2 Cir. 1949), a verdict for plaintiff was affirmed and among other things Judge Swan said at page 327:

> "It must also be conceded that the precise moment of Capt. Casey's death is unknown and that even if the fire had been discovered promptly and if the inside fire hose had been available under sufficient pressure without any delay, one cannot know with certainty that the captain's life would have been saved. * * * *But almost every verdict of a jury involves the element of speculation or conjecture to some extent.*"

In *Tennant* v. *Peoria & P. U. Ry. Co.*, 321 U. S. 29 (1944) at page 35, the Court stated:

"* * * It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. Washington & Georgetown R. Co. v. McDade, 135 U. S. 554, 571, 572; Tiller v. Atlantic Coast Line R. Co., supra, 68; Bailey v. Central Vermont Ry., 319 U. S. 350, 353, 354. That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because Judges feel that other results are more reasonable."

In the instant case there certainly existed a conflict in the testimony between the experts as to whether the vessel's Master performed the attempted rescue in a competent manner; as to how long a person could be expected to survive in the particular area of the Atlantic Ocean affected as it was by the Gulf Stream; as to whether petitioner's decedent was injured upon leaving the vessel and entering the water and as to whether the vessel was on a proper course during the search. There were also conflicting conclusions which could have been drawn by the jury from the testimony of Chief Electrician Levy and Chief Steward Aiken with respect to whether petitioner's decedent was mentally disturbed during the five days of the vessel's voyage by reason of the fact that Miller did not sleep in his bed for two consecutive nights and renewed the smoking habit and drank some rum on one night. The jury in answering Interrogatory First in the negative resolved this conflict concerning Miller's mental condition and it is reasonable to infer from this jury answer that Miller was not mentally disturbed when he fell into the sea. In their answers to Interrogatory Second the jury resolved the con-

flict of testimony between the experts and the jury concluded that the negligence of the defendant caused, at least in part, the death of plaintiff's decedent. While the Trial Court and the Court of Appeals may have reached conclusions opposite to that of the jury and may have differed with the ultimate findings of fact of the jury, error was committed when a directed verdict for the respondent was granted.

III

The departure by the Court of Appeals from the constitutional protection afforded the petitioner and others similarly situated warrants the exercise of this Court's power of supervision.

As stated by this Court in *Schulz* v. *Pennsylvania Railroad Company*, 350 U. S. 523 (1956) "the jury trial 'is part and parcel of the remedy afforded railroad workers under the Employers Liability Act,' which the Jones Act makes applicable to those working as petitioner's husband was here. (Footnoting Bailey v. Central Vermont R. Co., 319 U. S. 350, 354.) The Seventh Amendment to the Constitution provides that 'the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.' (Footnoting Galloway v. United States, 319 U. S. 372, and cases there cited."

While the majority of this Court in the *Schulz* case did not explicitly overrule the majority opinion in the *Galloway* case (a non-F. E. L. A. case) yet the only reasonable conclusion is that the concepts expressed in the dissenting opinion in the *Galloway* case, written by Mr. Justice Black and concurred in by Mr. Justice Douglas and Mr. Justice Murphy, are now the concepts which prevail in this Court.

Mr. Justice Black pointed out in his detailed dissent in the *Galloway* case that the Supreme Court must be ever

vigilant that the lower courts not be permitted to constrict the fundamental right of trial by jury through narrow construction which can only have the effect of depriving litigants of their Constitutional rights and statutory remedies.

Indeed, the Chief Judge of the Court of Appeals for the Second Circuit has recognized that this danger of judicial constriction is present in that court.

In *Kermarec* v. *Compagnie Generale Transatlantique*, 245 F. 2d 175, Chief Judge Clark in his dissent said:

> "* * * another instance of judicial meddling with jury verdicts with which the judges disagree."

(Petition for writ of certiorari was filed in the *Kermarec* case on Sept. 20, 1957.)

Likewise in *Palermo* v. *Luckenbach Steamship Company*, 246 F. 2d 557, Chief Judge Clark in his dissent found and deplored

> "a growing tendency in this Court to upset awards in jury cases."

(Petition for writ of certiorari and summary reversal was granted Oct. 21, 1957.)

The misconception by the Court of Appeals for the Second Circuit as to the full meaning of the right of trial by jury has resulted in a direct conflict between that circuit and the Court of Appeals for the Seventh Circuit in decision of the Seventh Circuit in the case of *Gibson* v. *Elgin, Joliet & Eastern Railway Company*, 246 F. 2d 834 (rehearing denied Aug. 30, 1957).

In *Gibson* v. *Elgin, J. & E. R. Co.*, the jury in an F. E. L. A. case involving some measure of speculation had returned a verdict for the plaintiff. The Trial Court set aside this jury verdict and granted judgment n. o. v. to defendant. The Court of Appeals reversed the Trial Court upon the authority of the *Rogers* case and the *Lavender* case.

The case at bar belongs to that important class of cases requiring respect for the proper jury function referred to in the concurring opinion of Mr. Justice Douglas in *Wilkerson* v. *McCarthy*, 336 U. S. 53.

CONCLUSION

For all of the reasons outlined the petitioner prays that this Court grant the writ of certiorari and petitioner further prays that this Court grant summary reversal because, it is submitted, the decision of the Court of Appeals, which affects this important class of cases, is so clearly erroneous as to make argument before this Court a waste of time.

Respectfully submitted,

39 Broadway,
New York 6, N. Y.,
Attorney for Petitioner.

Appendix A

Opinion of the United States Court of Appeals for the Second Circuit

---

No. 367—October Term, 1956.

(Argued June 5-6, 1957 Decided August 16, 1957.)

Docket No. 24066

MILDRED L. MILLER, individually and as Administratrix of the goods, chattels and credits of JAMES W. MILLER, deceased,

Plaintiff-Appellant,

—v.—

FARRELL LINES, INCORPORATED,

Defendant-Appellee.

Before:

MEDINA, LUMBARD and WATERMAN,

Circuit Judges.

In an action brought under the Jones Act, 46 U. S. C. A. § 688, to recover for the death of the plaintiff's husband, who disappeared from defendant's vessel, S. S. African Glade, in the middle of the Atlantic Ocean, plaintiff appeals from an order of Edmund L. Palmieri, *Judge,* Southern District of New York, setting aside a jury verdict of $55,000 for the plaintiff and entering judgment for the defendant.

HERBERT J. KAPLOW, New York, N. Y., for plaintiff-appellant.

STAPLETON, FLYNN & LILLY, New York, N. Y., for defendant-appellee. DANIEL FLYNN and GEORGE M. SULLIVAN, of Counsel.

LUMBARD, *Circuit Judge*:

This is an action brought under the Jones Act, 46 U. S. C. A. § 688, to recover for the alleged wrongful death of James W. Miller, the plaintiff's husband. The complaint alleged that Miller was caused to be "washed overboard" because defendant was "negligent in failing to maintain a proper and adequate guard and watch over" Miller "when they knew or should have known of his disturbed condition; in failing to take adequate and necessary steps to have him relieved from his duties; in failing to render adequate, prompt and proper medical aid and attention, and in failing to take all the adequate, proper and necessary steps to conduct a search for him after he went overboard. As a result of all of which he was lost at sea and died on the 14th day of November, 1950." The defendant moved for a directed verdict both at the end of plaintiff's case and after the entire case. Judge Palmieri reserved decision in both instances and submitted the case to the jury. After the jury returned a verdict of $55,000. for the plaintiff, Judge Palmieri granted the defendant's motion to set aside the verdict and directed judgment for the defendant. From this decision the plaintiff appeals.

On November 10, 1950, a week following graduation from the United States Maritime Service School as a qualified assistant electrician, Miller signed articles on the S. S. African Glade, a C-2 type freighter, owned and operated by the Farrell Lines, for his first and last voyage as an assistant electrician. The ship sailed the evening of the same day for Dakar, West Africa. Miller shared a cabin in the forecastle with Chief Electrician Levy, his immediate superior. He had not previously shipped aboard this ves-

sel and apparently knew no other members of her crew. Miller had been at sea for 22 years as he went to sea at the age of 14, and during his service in the British Merchant Marine he attained the rank of Master of British Ships.

About 6:00 P. M. on November 14 the Chief Electrician returned to his quarters and found Miller there reading, and about 6:30 P. M. Levy left him alone in the cabin. Around 11:30 P. M. Chief Steward Leopold Aiken saw Miller pacing the afterdeck and noticed nothing unusual about him except that he appeared deep in thought. This was the last time Miller was seen aboard the vessel. As may be expected in such a case there is no evidence as to the time, manner or place of his departure from the ship. The case was tried on the theory that Miller jumped overboard intending to commit suicide.

The next morning, November 15, Chief Electrician Levy got up about 7:30 A. M. He noticed that Miller's bunk had not been occupied that night but did not think it strange since Miller had not occupied his bunk the night before. When Miller did not show up at the 10:00 A. M. coffee break, Levy, after inquiring of his whereabouts from other members of the crew, reported him missing to the master, Captain Wilder.

Captain Wilder thereupon called all department heads and had a search of the vessel made for the decedent. Miller was not found and at 10:20 A. M. the African Glade turned back 180 degrees into her own wake on the course which it had just sailed.

Captain Feinne, plaintiff's maritime expert, testified that from his examination of the log book of the African Glade he concluded that the course she took after making this turn was not reciprocal, but was a parallel course, twelve or thirteen miles south of a reciprocal course. Captain Wilder, though admitting he did not have a navigational fix taken, testified that he turned the bow of the African Glade back into her own wake thus pursuing the reciprocal course.

During the search Captain Wilder sent a radio telephone message concerning the disappearance to his home office and one to the U. S. Coast Guard Weather Ship. Captain Wilder did not radio any of the other ships in the vicinity, admittedly the correct procedure, for the Coast Guard was in touch with all such ships.

When darkness fell at 5:16 P. M. the search was called off; the African Glade was then approximately 70 miles from the place where she had been when Miller had last been seen alive at 11:30 P. M. the night before. The ship then headed again toward Dakar.

In reserving his decision on the defendant's motion for a directed verdict, Judge Palmieri made it quite clear that it was his opinion that there was a complete lack of proof on the question of causation, but he let the case go to the jury to avoid the trouble and expense of a new trial should he later be held in error. In his charge to the jury, Judge Palmieri defined negligence and proximate cause and the jury was instructed that they could not find for the plaintiff for failure to make proper rescue efforts unless they first concluded that Miller was alive at 10:20 A. M. on the morning of November 15, 1950.

With the consent of counsel (subject of course to the defendant's motions for a directed verdict) Judge Palmieri then submitted special interrogatories to the jury which returned the answers as noted:

> First: Did Miller's conduct aboard the S. S. Africaan Glade between November 10, 1950 and November 14, 1950, manifest signs of instability which could reasonably have led the Master ~~or his~~ associate officers or Chief Electrician Levy to believe that there was danger that he might do harm to himself?
>
> The answer is no.
>
> Second: Upon being notified that Miller had disappeared from the S. S. African Glade at 10:20 A. M. on November 15, 1950,

(a) Was James W. Miller alive at that time?
The answer is yes.

(b) Did Captain Wilder, the Master of the ship, take all proper and efficient means to effect a rescue?
The answer is no.

Third: In addition to answering the above questions, please report your verdict as follows:
For the defendant—No.
Plaintiff—Yes.

(a) Amount, if any, awarded for the pain and suffering of James W. Miller. None.

(b) Amount, if any, awarded for the pecuniary loss to the widow. $10,000.

(c) Amount, if any, awarded for the pecuniary loss to the child. $45,000.

Immediately after the verdict, Judge Palmieri granted the defendant's motion for a directed verdict on the ground that there was no proper basis for the establishment of any causal relationship between the alleged negligent search and Miller's death. We agree.

In a suit under the Jones Act, it is necessary to show that the allegedly negligent act or omission of the defendant caused, in whole or in part, the damage for which recovery is sought . *Rogers* v. *Missouri Pacific R. Co.*, 352 U. S. 500 (1957); *Ferguson* v. *Moore McCormack Lines, Inc.*, 352 U. S. 521 (1957). The burden of showing this causation rests on the plaintiff. *Johnson* v. *N. Y. N. H. & H. R. Co.*, 194 F. 2d 194 (2 Cir. 1952), rev'd on other grounds, 344 U. S. 48; *Pittsburg S. S. Co.* v. *Palo*, 64 F. 2d 198 (6 Cir. 1933). In this case the plaintiff did not introduce evidence of any probative facts to show that the defendant's negligence played any part in Miller's loss of life. The jury was required to indulge in a series of speculations.

The jury's first speculation was whether Miller left the ship and struck the water, 20 to 25 feet below the deck on which he was last seen, in such a way as to avoid the action of the propeller. There was evidence that a man jumping from the side of a vessel, aft of midships, would be caught in the suction created by the forward motion of the ship, drawn into the screw and mangled. Secondly, the jury would have to suppose that Miller had hit the water in such a way as to remain afloat. Even though the air and water temperatures were between 72 and 74 degrees during the pertinent period of time, there was no evidence that Miller took with him any means of staying afloat, such as a life preserver. On the contrary, the plaintiff's case was tried on the theory that Miller was unstable and meant to commit suicide. The fact that a man jumps overboard into the sea to commit suicide is hardly a factual basis for speculating on the ways and means of his staying alive and afloat under circumstances of the greatest difficulty even for a much younger expert swimmer fighting desperately for his life. Indeed the record is barren of evidence as to whether Miller could swim.

Thus a further speculation is necessary, namely whether after entering the sea Miller changed his mind about suicide and did his best to stay afloat.

This in turn would lead to the speculation as to how long Miller, who was 36 years of age, could stay afloat, and whether he could and would stay afloat long enough for the ship to have reached him. Speculation on this issue in turn depended, at least in some measure, upon yet further speculation as to when Miller left the ship; for it would appear necessary to surmise such a moment in order to establish a causal relationship between the alleged negligent conduct of the defendant and the resulting death of Miller. Thus, if Miller had left the ship at 11:30 P. M. it would have taken the ship at least eleven hours to reach Miller after the discovery of his absence. That is, Miller would have had to stay afloat for twenty-two hours before

he could be rescued. Indeed the speculation probably went further in view of plaintiffs' claim that the African Glade should have kept on through the darkness until it had reached the point where she was when Miller was last seen at 11:30 P. M. and she should have stayed there until daylight and then combed the area in concentric circles for several hours.

Thus a series of speculations must all be indulged in and resolved in favor of the plaintiff in order to find any basis for saying that Miller could possibly have stayed afloat and alive long enough to be picked up. Each of these speculations must also reach a result which is contrary to the overwhelming probabilities. We do not see how the District Court could permit to stand such a jury finding in view of the fact that the plaintiff has the burden of proof. We do not believe that the Jones Act was meant to make ships the absolute insurers of the lives of their crew members who are lost at sea.

There was no proof of any probative facts to indicate when, where or how Miller left the ship. There is no fact from which it could be argued that Miller desired to stay alive. In a case which was tried on the theory that Miller was in a suicidal state of mind and where all the facts seem to bear this out, it is difficult to justify a verdict which must be based in part on the speculation that he changed his mind

Schulz v. *Pennsylvania Railroad Co.*, 350 U. S. 523 (1956) we believe supports the defendant's position. Schulz, a capable and experienced workman who had been in Pennsylvania's employ for several years, was assigned to night work on four tug boats docked side by side. It was Christmas night and as the company did not have enough workers Schulz had to take care of all four tugs by himself. Three of the tugs were wholly unlighted and dark. In 10 degrees above zero temperature there was some ice on the tugs and Schulz had to go from one tug to the other by flashlight. He was last seen at 7 P. M. and an inspector found him miss-

ing at 1:25 A. M. Several weeks later Schulz' body was found in the water nearby, clothed only in shorts and socks and with a flashlight in his hand. It was conceded that he was not under the influence of alcohol when he reported for work, that he did not commit suicide, that there was no foul play and that he met his death by accident. *Ib.*, p. 525. In reversing our affirmance of the trial court's direction of a verdict for the defendant, Justice Black wrote at page 526:

> "Fair minded men could certainly find from the foregoing facts that the defendant was negligent in requiring Schulz to work on these dark, icy and undermanned boats. And reasonable men could also find from the discovery of Schulz's half-robed body with a flashlight gripped in his hand that he slipped from an unlighted tug as he groped about in the darkness attempting to perform his duties. * * * Fact finding does not require mathematical certainty, (footnoting Lavender v. Kurn, 327 U. S. 645, 653). Jurors are supposed to reach their conclusions on the basis of common sense, common understanding and fair beliefs, grounded on evidence consisting of direct statements by witnesses or proof of circumstances from which inferences can fairly be drawn."

In *Schulz* there was considerable evidence from which the jury could conclude that Schulz met his death, at least in part, because of the defendant's negligence in having insufficient help to man unlighted and dark tugs which were icy in places. There were facts from which this conclusion could be drawn.

Here all the facts indicate that Miller had neither the intention to survive nor the means of survival when he disappeared from the African Glade. For Miller's alleged intentions, for his unobserved disappearance from the ship and for his apparent lack of any means to survive in the waters of the Atlantic Ocean it cannot be said that there

was any basis for concluding that the defendant was responsible in whole or in part. The jury's conclusions were not based on common sense or reasonable beliefs. *Schulz* v. *Pennsylvania Railroad Co., supra.*

The District Judge would have been justified in granting the defendant's motion for a directed verdict, either at the end of the plaintiff's case, or at the conclusion of the entire case. In any event Judge Palmieri's direction of a verdict for the defendant, even after the jury verdict, was clearly right.

Judgment affirmed.

Jury Verdict

The Clerk: Mr. Foreman, have you agreed upon a verdict?

The Foreman: We have.

The Clerk: How do you find?

The Foreman: Do you want me to read it, your Honor?

The Court: Yes.

The Foreman: "Miller v. Farrell Lines Company.

"First: Did Miller's conduct aboard the S. S. African Glade between November 10, 1950, and November 14, 1950, manifest signs of instability which could reasonably have led the Master or his associate officers or Chief Electrician Levy to believe that there was danger that he might do harm to himself?"

The answer is no.

"Second: Upon being notified that Miller had disappeared from the S. S. African Glade at 10:20 A. M. on November 15, 1950,

"(a) Was James W. Miller alive at that time?"

The answer is yes.

"(b) Did Captain Wilder, the Master of the ship, take all proper and efficient means to effect a rescue?"

The answer is no.

"Third: In addition to answering the above questions, please report your verdict as follows:

"'For the defendant'"—No.

"Plaintiff'"—Yes.

"(a) Amount, if any, awarded for the pain and suffering of James W. Miller." None.

"(b) Amount, if any, awarded for the pecuniary loss to the widow." $10,000.

"(c) Amount, if any awarded for the pecuniary loss to the child." $45,000.

Appendix B

Statutes and Rules

TITLE 46 U. S. C. § 688

"§ 688. *Recovery for injury to or death of seaman*

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States, conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located. Mar. 4, 1915, c. 153, § 20, 38 Stat. 1185; June 5, 1920, c. 250, § 33, 41 Stat. 1007."

TITLE 45 U. S. C. § 52

"§ 52. *Carriers in Territories or other possessions of United States*

Every common carrier by railroad in the Territories, the District of Columbia, the Panama Canal Zone, or other possessions of the United States shall be liable in damages to any person suffering injury while he is employed by such carrier in any of said jurisdictions, or, in the case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or *death resulting in whole or in part from the negligence* of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment. Apr. 22, 1908, c. 149, § 2, 35 Stat. 65." (Italics ours.)

Federal Rules of Civil Procedure

"RULE 50. MOTION FOR A DIRECTED VERDICT.

(a) *When Made: Effect.* A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor.

(b) *Reservation of Decision on Motion.* Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the

court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

"Rule 49. Special Verdicts and Interrogatories. * * *

(b) GENERAL VERDICT ACCOMPANIED BY ANSWER TO INTERROGATORIES. The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict. When the general verdict and the answers are harmonious, the court shall direct the entry of the appropriate judgment upon the verdict and answers. When the answers are consistent with each other but one or more is inconsistent with the general verdict, the court may direct the entry of judgment in accordance with the answers, notwithstanding the general verdict or may return

the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, the court shall not direct the entry of judgment but may return the jury for further consideration of its answers and verdict or may order a new trial."

United States Constitution

AMENDMENT VII—CIVIL TRIALS

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."